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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 203.

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

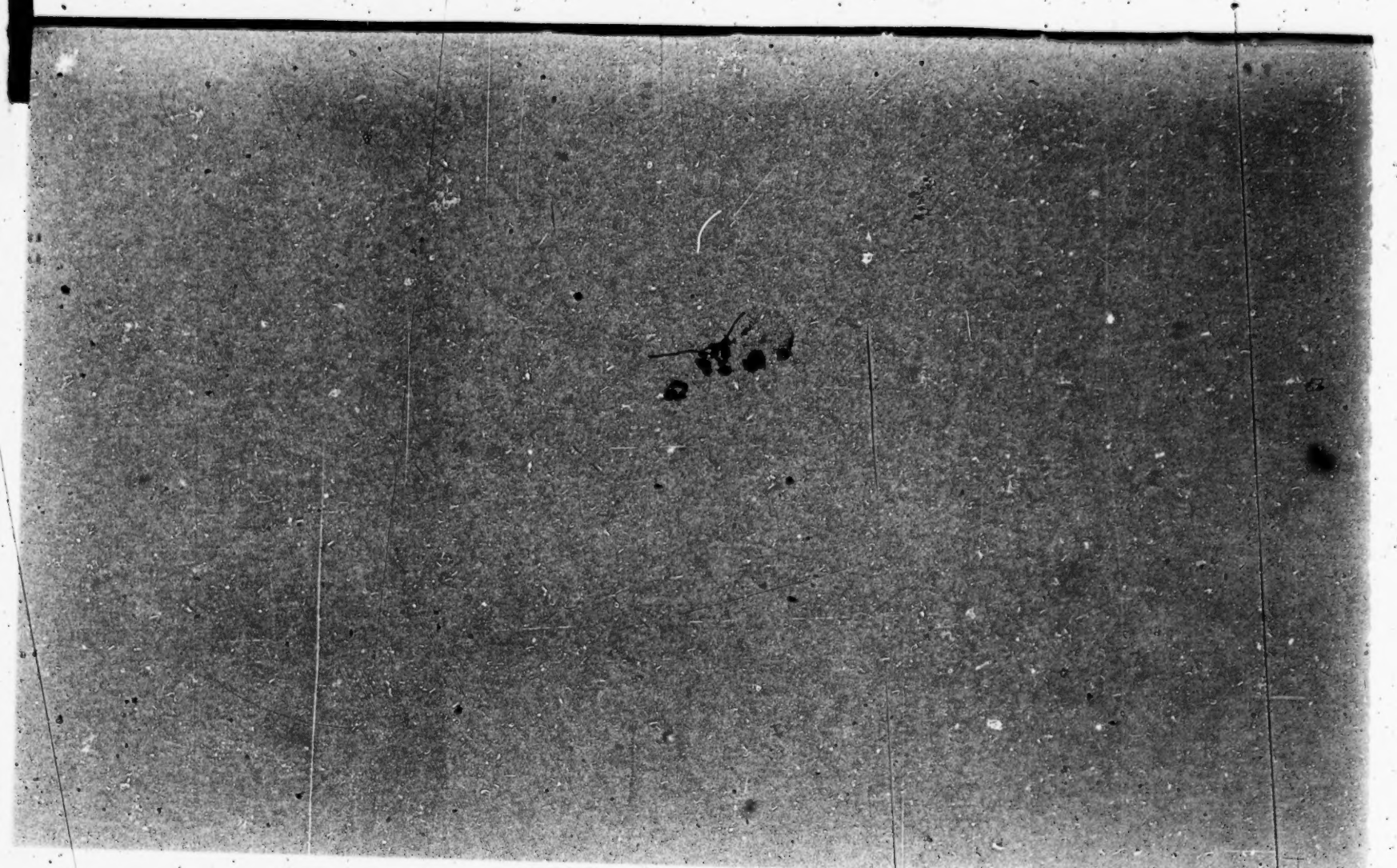
BRIEF IN OPPOSITION TO MOTIONS TO DISMISS.

JOSEPH H. STAMLER,
MELVIN P. ANTELL,
11 Commerce Street,
Newark 2, New Jersey,

LORENTZ & STAMLER,
Of Counsel.

EVERETT I. WILLIS,
40 Wall Street,
New York 5, New York,
Attorneys for Eli Lilly and Company, Appellant.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD,
Of Counsel.



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This brief is submitted by appellant Eli Lilly and Company in opposition to separate Motions to Dismiss filed by appellees Sav-On-Drugs, Inc. and the State of New Jersey, intervenor.

Appellant commenced this action in the Superior Court of New Jersey for an injunction under the New Jersey Fair Trade Act. That court's dismissal of the action on the ground of appellant's failure to qualify to do business in New Jersey was affirmed by the New Jersey Supreme Court.

Appellees curiously seek to sustain the decision below by contradicting its major premise. The court below clearly held that appellant, even though doing only interstate business, could constitutionally be required to obtain the State's permission to carry on that business in New Jersey. How-

ever, appellees now argue for the first time that appellant is engaged in intrastate commerce in New Jersey. In addition, they contend that even if appellant is engaged solely in interstate commerce, the decision below does not contravene the Commerce Clause. These contentions will be discussed in order.

I.

Appellant Is Engaged Solely in Interstate Commerce in New Jersey and the Courts Below So Held.

Appellees' contention that Lilly is doing intrastate business in New Jersey is both contrary to the facts and in total disregard of the decisions of the Superior and Supreme Courts of New Jersey. Appellees point to nothing in the lower court's opinion which suggests a finding that appellant was doing an intrastate business in New Jersey. Had such a finding been made, it would have easily disposed of the case on the facts since appellant did not contest the constitutionality of qualification statutes as applied to corporations doing intrastate business. Clearly this was not the basis of the court's lengthy opinion devoted to the argument that despite the interstate nature of the appellant's business New Jersey could constitutionally require appellant to qualify under the New Jersey statute. To be sure, the court below held that appellant was "doing business" in New Jersey, but the business appellant does in New Jersey was recognized to be interstate, not intrastate.

Significantly, in their briefs before the New Jersey Supreme Court appellees did not argue that appellant was in intrastate commerce or that the lower court had ruled that it was. On the contrary, both appellees implicitly conceded that appellant was doing a solely interstate busi-

ness but contended that the statute by its terms applies to "any business" regardless of its nature and is constitutional as so applied.

Contrary to their position below, appellees evidently would now treat "doing business in New Jersey" as necessarily connoting intrastate commerce. But this begs the crucial question as to the *kind* of business done. Obviously there can be no interstate commerce without some local activity. In *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 103-06 (1910), the state court had likewise found that the foreign corporation was "doing business" in Kansas. On appeal this Court expressly approved that finding, but went on to hold that the business was in interstate commerce and the statute unconstitutional as applied to the corporation. Similarly, the lower court here, having made the finding that appellant was "doing business", went on in part II of its opinion to consider the constitutional issue raised by appellant's contention that the New Jersey statute may not be applied to it because "it is engaged entirely in interstate commerce" (Opinion, Juris. St., pp. 32-3). The court never disputed the fact that appellant's business was "entirely in interstate commerce." Had it done so, there would have been no necessity for it to deal with the constitutional issue.

In contending, contrary to the holding of the New Jersey courts, that appellant is engaged in intrastate commerce in New Jersey, the intervenor relies entirely upon *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147 (1918), which sustained a state tax on the local business of a corporation engaged also in interstate commerce. At the outset it should be noted that the *Cheney* case had nothing to do with the questions of corporate qualification and access to courts involved here. The difference between tax cases and qualification cases has long been recognized. See, e.g.,

Isaacs, *An Analysis of Doing Business*, 25 Col. L. Rev. 1018, 1025 (1925). And soundly so. This Court has long been receptive to the claim that "interstate business must pay its way." *Postal Tel.-Cable Co.* v. *Richmond*, 249 U. S. 252, 259 (1919). Thus, in tax cases, there has been liberality in looking to some "local incident" upon which the state's power to tax could be upheld. E.g., *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940). This Court has been equally zealous, however, to protect the right of a foreign corporation in interstate commerce to have free access to the courts for enforcement of its rights. E.g., *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914).

But aside from this important distinction between tax and qualification cases, intervenor misstates the facts when it says that Lilly's activities in New Jersey are "identical" to those of the corporation in *Cheney*. They are quite different. The salemen in *Cheney* were engaged in regular solicitation as agents for domestic wholesalers. The Supreme Judicial Court of Massachusetts had expressly found that

> "The major part of the plaintiff's business in Massachusetts is furnishing salesmen *to act as agents* for the domestic wholesalers in *soliciting* orders from domestic retailers. This is in substance the *business of providing agents* for the wholesalers." 218 Mass. 558, 575, 106 N. E. 310, 317 (1914) (emphasis supplied).

Here, on the other hand the court below found that

> "It is the function of the detail men to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products" (Opinion, Juris. St., p. 29).

As to orders for wholesalers, the opinion below states that

> "On an occasion, these detail men, 'as a service to the retailer,' may receive an order for plaintiff's products for transmittal to a wholesaler." (Opinion, Juris. St., p. 29).

There are thus three basic factual distinctions between the present case and *Cheney.* The orders here are (1) not solicited, (2) received only "on an occasion", not as a regular course of business, and (3) transmitted as a service to the purchasing retailer, not as agent for the selling wholesaler. Appellant's detail men act as agents for no one except appellant in New Jersey. Their function is to promote the sale of appellant's products in interstate commerce. This is the accepted method of advertising by ethical drug companies such as appellant, since they neither sell nor advertise directly to the consuming public, and the usefulness of this means of circulating information about drug products is widely recognized. See *Hoffmann-La Roche Inc.* v. *Schwegmann Bros. Giant Super Markets,* 122 F. Supp. 781, 782-83 (E. D. La. 1954). These activities are directly in aid of appellant's interstate business.

Promotion and advertising are fundamental to the conduct of American business today. No company can do a substantial interstate business without it. Regardless of the level at which they sell—whether to manufacturers, wholesalers, retailers or consumers—most companies engage in advertising and promotion at the retailer and consumer level to make their products known and increase their acceptance. If the mere fact of advertising and promotion were to be considered as doing a local business then the protection of the Commerce Clause would be withdrawn from virtually every interstate corporation in the nation.

This would be a startling innovation. It certainly is not compelled by the *Cheney* case, which dealt with regular solicitation of sales as agents for local wholesalers, not with mere promotional and informational activities incident to interstate sales. The fact that, as a courtesy, an occasional unsolicited order is transmitted to a wholesaler is too trivial and insubstantial to localize the essential interstate character of appellant's activities in New Jersey. Cf. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 461 (1959). The lower court plainly attached no significance to this fact.

Not only is *Cheney* distinguishable on the facts, but more recent authority limits the scope of the *Cheney* holding even on its own facts. In the landmark *Portland Cement* case, *supra*, which held that states may tax income derived from business activities exclusively in interstate commerce, this Court's opinion recited as to one of the corporations involved:

> ". . . appellant's salesmen also contacted potential customers and users of cement products, such as builders, contractors, architects, and state, as well as local government purchasing agents. Orders were solicited and received from them, on special forms furnished by appellant, directed to an approved local dealer who in turn would fill them by placing a like order with appellant. Through this system appellant's salesmen would in effect secure orders for local dealers which in turn were filled by appellant in the usual manner." 358 U. S. at 454-55.

Despite this activity (including solicitation; not present here) this Court accepted the state court's finding that the corporation was engaged entirely in interstate commerce and went on to deal with the constitutional issue

which, of course, would not have been posed absent that finding.*

Moreover, following the *Portland Cement* decision, Congress enacted Public Law 86-272, 73 Stat. 555 (1959), which exempts from state taxation income derived not only from solicitation of orders to be approved and to be filled by shipment of goods from outside the state, but also from solicitation of orders for the benefit of a customer who in turn gives orders which are approved and filled by shipment from outside the state. In other words, Congress has expressly given immunity from state taxation to income derived from solicitation at a lower level than that at which the interstate shipment takes place. The legislative history shows a recognition by Congress of the importance of such activities in the conduct of many interstate businesses. See Senate Report No. 658, 86th Congress, 1st Session (1959).

In sum, it is clear that there is no basis for appellee's contention that appellant was engaged in intrastate commerce in New Jersey.

II.

The New Jersey Qualification Statute Is Unconstitutional as Applied to Appellant.

A. The privilege of engaging in interstate commerce cannot be granted or withheld by the states.

That state qualification statutes—regardless of their particular provisions—may not be applied to foreign corporations exclusively in interstate commerce has been settled

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* This finding was necessary to the result, since the state statute imposed the tax only on corporations whose business within the state "consists exclusively of foreign commerce, interstate commerce, or both." See 358 U. S. at 453.

constitutional law for fifty years.* In posing the constitutional question in terms of the alleged lack of burdensomeness of the particular statute involved, appellees are diverting attention from the real question. The essential vice of the New Jersey statute, as applied to foreign corporations in interstate commerce, is that it deals with a matter not within the competence of the states—the exclusively federal right to engage in interstate commerce. As Mr. Justice Clark pointed out in the *Portland Cement* case:

> "This Court has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a State . . ." (358 U. S. at 464).

Yet this is exactly what the New Jersey statute, as interpreted by the court below, purports to do: grant the privilege of doing an interstate business in New Jersey upon compliance with state-imposed conditions. It is true, as appellees state, that this Court has gone a long way in upholding some types of state regulation that incidentally affect interstate commerce, but it has never deviated from the rule of *Crutcher* v. *Kentucky*, 141 U. S. 47, 57 (1891) that "To carry on interstate commerce is not a franchise or a privilege granted by the State."

In the *Portland Cement* case, while sustaining the right of the states to tax income earned exclusively from inter-

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* The decisions of this Court as well as of state courts (see Juris. St. pp. 6-9) established the principle so clearly that it was embodied in the Restatement of Conflict of Laws, in the following terms (Section 175):

> "Under the Constitution of the United States, a State cannot require that a foreign corporation, as a condition of engaging within the State solely in interstate commerce, designate a principal place of business or file an annual statement of condition or satisfy certain standards in respect to its financial structure or condition."

state commerce, the Court emphasized its continued adherence to the principle that States could not tax the privilege of engaging in interstate commerce, previously reaffirmed in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). The *Spector* case had made clear that it was not the burdensomeness of the tax which offended the Commerce Clause but the fact that it was laid on a privilege that was not within the competence of the State to grant.* The fact that *Spector* and *Portland Cement* exist side by side demonstrates that this Court can and does give recognition to legitimate state action affecting interstate commerce while at the same time requiring that the States respect fundamental limitations placed on them by the Commerce Clause.

The cases cited by intervenor merely illustrate the difference between essentially local police regulation of particular industries, incidentally affecting interstate commerce, and the assertion of state power over the very privilege of engaging in *any* interstate commerce. In the one case, the test of constitutionality under the Commerce Clause is whether the regulation unduly burdens interstate commerce; in the other, the basic power to grant, deny, or condition the privilege is wholly lacking.

In the light of this well-settled distinction, the inapplicability of the cases cited by intervenor becomes clear. *South Carolina State Highway Dep't* v. *Barnwell Bros.*, 303 U. S. 177 (1938) dealt with a regulation limiting size and weight of vehicles on the state's own highways, a matter primarily within the police power of the state. So also,

* "The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for protection given by the State." *Spector Motor Service* v. *O'Connor*, 340 U. S. at 607. Mr. Justice Burton concluded in that case that to hold that "the federal privilege of carrying on exclusively interstate commerce" could not be taxed "gives lateral support to one of the cornerstones of our constitutional law. *McCulloch* v. *Maryland*." (340 U. S. at 610.)

Panhandle Eastern Pipe Line Co. v. *Michigan Commission*, 341 U. S. 329 (1951) and *Robertson* v. *California*, 328 U. S. 440 (1946) involved state legislation aimed at local gas sales and deceptive insurance practices, in particular industries traditionally subject to close state supervision. It is further to be noted that Congress has left to the states the power to regulate local aspects of both these industries. Natural Gas Act, §1(b) 52 STAT. 821, 15 U. S. C. §717 et seq.; McCarran Act, 59 STAT. 33, 15 U. S. C. §§1001-15.

As for *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944), this case was cited in appellant's Jurisdictional Statement as an example of the legitimate application of a qualification statute to a foreign corporation doing an essentially local business, albeit one related to the process of foreign commerce. The brokerage company was not itself engaged in foreign or interstate commerce. Not some, but all of its activities took place within the state.* Obviously, if a corporation conducting activities entirely within a single state could claim the protection of the Commerce Clause merely because of some connection with interstate commerce, there would be very little left of state control over local affairs. *Cf. Williams* v. *Fears*, 179 U. S. 270 (1900); *Federal Compress Co.* v. *McLean*, 291 U. S. 17 (1934). The Court was careful to point out the distinction between the *Union Brokerage* case and *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910), which did involve, as does the present case, a corporation actually engaged in commerce across the state lines. See 322 U. S. at 211. Thus,

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* The Supreme Court of Minnesota found that:

"The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce." *Union Brokerage Co.* v. *Jensen*, 215 Minn. 207, 220, 9 N. W. 2d 721, 727 (1943).

Union Brokerage represents no departure from the precedents cited by appellant.

B. No legitimate state interest justifies the application of qualification statutes to foreign corporations in interstate commerce.

That there is no necessity here to overrule established precedents in order to accommodate any significant need of the State was pointed out in the Jurisdictional Statement. The purpose of the qualification statute here involved was to obtain jurisdiction over foreign corporations. *Groel* v. *United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905). Yet, as both appellees admit, the New Jersey courts clearly can now obtain jurisdiction over foreign corporations under the "minimum contacts" rule of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) without the obtaining of any consent by means of this statute.*

While "burdensomeness" is not the issue, it may be noted that there is at least one highly burdensome aspect of compliance with the New Jersey statute. By exacting a general consent to suit, the New Jersey statute would subject corporations such as appellant to suits by non-residents on causes of action arising outside the State—suits which, in many if not all instances, would not be within the "minimum contacts" rule. This Court has on several occasions stricken down, as a burden on interstate commerce, the assertion of state jurisdiction over foreign corporations in interstate commerce in such situations. E.g., *Davis* v. *Farmers Co-op. Equity Co.*, 262 U. S. 312 (1923); see *Note*, 73 HARV. L. REV. 909, 983-87 (1960). Although under the

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* Nor is the statute necessary to accomplish service of process, since New Jersey court rules provide for service on any servant of a foreign corporation, and when this cannot be done, by registered mail, return receipt requested, to the principal office of the foreign corporation. N. J. Rev. Rules 4:4-4(d).

Due Process Clause, the State of New Jersey can obtain jurisdiction in all instances where it is fair to do so, the effect of the statute here involved is to acquire, by forced consent, additional jurisdiction even where it is unfair to do so and where it may burden interstate commerce. Surely, deference to the states does not require such a sacrifice of the interests of corporations in interstate commerce.

Recognizing that the New Jersey statute is not needed by the state for the purpose for which it was enacted, the intervenor has strained to submit another rationale for the statute. The new theory is that New Jersey has "a right to be apprised of the presence of foreign corporations" in order to determine whether they are subject to its tax laws or regulatory statutes such as the Workmen's Compensation and Unemployment Compensation laws. It is questionable constitutional doctrine to sustain a statute, not on the basis for which the Legislature enacted it, but on a supposed new use to which it may be put. Moreover, there is nothing in the record to indicate that this statute is being used by state agencies for informational purposes. There is nothing to show that these "purposes" reflect anything more than the speculative fertility of the intervenor.

Furthermore, the State of New Jersey can implement its tax and regulatory statutes by direct requirements for information returns and reports without imposing conditions on the right to engage in interstate commerce. In fact, it has already done so. The New Jersey Tax Bureau requires a return to be filed whenever a corporation is doing business within the State. N. J. Corporation Tax Bureau Regs. 16:10-1.130. Similarly, the New Jersey Unemployment Compensation Law contains express requirements, enforced by penalties, for the filing of reports and returns, and the agency implementing this

law has power to require additional reports. N. J. Rev. Stat. 43:21-11, 14. The Workmen's Compensation Law also provides for notice of compliance with its provisions and is enforced by criminal sanctions. N. J. Rev. Stat. 34:15-73, 79.

Thus, this supposed need to rely upon the qualification statute is, we suggest, pure invention.

C. The no-suit sanction is independently invalid under the Commerce Clause.

Because of the fact that the no-suit sanction improperly deprives foreign corporations in interstate commerce of their right to obtain justice in state courts, appellant pointed out in its Jurisdictional Statement that even if the qualification feature of the statute were to be upheld, the no-suit sanction should be stricken as an inadmissible interference with interstate commerce. Cases such as *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914) and *Furst* v. *Brewster*, 282 U. S. 493 (1931) stressed the offensiveness of the no-suit sanction under the Commerce Clause, while prior cases such as *Pigg, supra,* and *Buck Stove Co.* v. *Vickers*, 226 U. S. 205 (1912) emphasized the unconstitutionality of the qualification requirement itself. The intervenor argues that if this Court should uphold the qualification requirement, it need not follow *Sioux* and *Furst* because the cause of action here is based on the state fair trade law rather than on a contract for goods sold in interstate commerce.* Of course, this Court should not even reach this question because the qualification requirement is unconstitutional in itself. But even on the assumption that

* Appellant is unaware of any case which has drawn a distinction on the basis of the cause of action sued upon. On the contrary, appellant cited eight recent cases which allowed fair trade suits despite failure to qualify. Juris. St. p. 9.

it is not, the intervenor's argument for sustaining the no-suit sanction is specious.

The premise of the argument is the assertion that fair trade is a "matter of wholly local concern", justifying a denial of enforcement to corporations in interstate commerce. This premise is simply not true. Moreover it sidesteps the relevant question under the Commerce Clause, which is not whether the cause of action is "local", but whether a denial of the right to sue would unduly hamper the business of corporations engaged in interstate commerce.

The supposed "locality" of fair trade is based, according to the intervenor, on the fact that Congress has exempted fair trade agreements and enforcement against "non-signers" from the antitrust laws. This reasoning, to say the least, is difficult to follow. By the same token, contracts for the sale of goods in interstate commerce, such as involved in the *Sioux* and *Furst* cases, would be entirely of local interest because their enforcement depends entirely on state law; there is no federal law that gives a cause of action for the breach of such a contract. Activities do not cease to be in or to affect interstate commerce merely because they are not regulated by Congress. Under the intervenor's reasoning, if Congress were to repeal the Clayton and Sherman Acts entirely, activities previously subject to them would no longer be in interstate commerce.

Appellant's fair-trade program is an integral part of its interstate operations. On this very point the Supreme Court of New Jersey in another fair trade case has written as follows:

> "The sales to the consumer on the local level are of the very essence of the interstate process. The retail market is the outlet for goods distributed in

> interstate commerce under a uniform price formula designed, as just said, to afford nationwide protection of plaintiff's good will. There is no discernible line of separation between the interstate and the intrastate operation. It is an integrated whole." *Johnson & Johnson* v. *Weissbard*, 11 N. J. 552, 95 A. 2d 403, 406 (1953).

And the Massachusetts Supreme Judicial Court recently stated in *Remington Arms Co.* v. *Lechmere Tire & Sales Co.*, ... Mass. ....., 158 N. E. 2d 134, 139 (1959):

> "These [fair trade] contracts were made in protection of the good will of the plaintiff's interstate business. . . . The activities of Parker, the field agents, or the professional shoppers are a part of the plaintiff's interstate business and a necessary prelude to court enforcement. . . . Resort to the courts similarly is not to be regarded as intrastate business. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197."

As stated in these cases, the legal basis for fair trade is the protection that it affords to the trade mark and good will of the manufacturer, which enhance the value of its goods distributed in interstate commerce. The fact that Congress removed fair trade from the scope of the antitrust laws indicates, not that it was indifferent to the plight of the manufacturer but, on the contrary, that it considered these interests to be deserving of protection. The intervenor's construction would result in a discrimination against corporations in interstate commerce in the enforcement of fair trade while granting such protection to local businesses.*

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* As if to compensate for the weakness of its argument, the intervenor offers appellant the consolation that it might still enjoy some measure of fair trade protection in New Jersey since wholesalers and retailers are also permitted by the fair trade law to bring enforcement actions. But if this were adequate protection, appellant would not have found it necessary to institute more

Moreover, the essential inquiry should not be whether the suit is based on a local cause of action, but whether failure to entertain the action would result in harm to interstate business. The bulk of legal remedies on which business concerns rely to protect their interests, such as trade libel, interference with contracts, unfair competition, replevin, and disclosure of trade secrets, are state-created. If the intervenor's contention were upheld, New Jersey would be able to deny enforcement for all these actions.* As a corporation in interstate commerce, appellant is in New Jersey "for all the legitimate purposes of such commerce." *Sioux Remedy Co.* v. *Cope, supra,* at 203-04. Without access to the courts to enforce its legal rights growing out of that commerce, whether those rights are state-created or not, the conduct of appellant's interstate business in New Jersey would be placed in serious jeopardy.

Furthermore, there is no rational connection between the no-suit sanction and the "information" rationale now suggested for the qualification requirement. Appellant is not aware of any other type of tax or regulatory statute, state or federal, which is enforced by barring access to the courts. The federal government has collected billions under its income tax and social security laws without having sought from Congress the power to deny tax delinquents

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than 30 fair trade suits in New Jersey in recent years nor, indeed, to prosecute this appeal. Obviously, appellant cannot rely solely on others, with interests different from appellant's, to protect its valuable good will and trade marks. See *Carter Products Inc.* v. *Alexander's Dept. Stores Inc.*, 1960 CCH Trade Cases ¶69,779 (Sup. Ct. N. Y. Co.).

* The New Jersey retaliatory statute, N. J. Rev. Stat. 14:15-5, adopts the Indiana corporation statute, Burns Indiana Stat. Ann. 25-314, which bars suits in all types of actions for failure to qualify. See Opinion, Juris. St. pp. 36-38. Under the *Erie* doctrine, in diversity cases the federal courts would also be closed. *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 (1949).

access to the federal courts. In the *Portland Cement* case this Court was careful to point out, in consonance with prior cases, that the state tax which it upheld could be enforced "only through ordinary means." 358 U. S. at 462. Cf. *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530 (1888).

In considering whether this sanction offends the Commerce Clause, it is important to note that the statute provides another sanction by which it can be enforced. Under N. J. Rev. Stat. 14:15-6 the Attorney General is authorized to bring a legal action to impose a penalty of two hundred dollars ($200) for each violation of the statute by an unqualified foreign corporation. Thus, the state does not have to rely upon the no-suit sanction and has the power to enforce the qualification requirement by direct and more appropriate action. The existence of this rational and more suitable alternative (cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951)) removes any justification for conferring a gratuitous benefit on a private party and denying justice to another.

Conclusion.

Appellant has shown that both the qualification requirement and the no-suit sanction as here applied are violative of the Commerce Clause of the Constitution. The decision below being in error, the motions to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

JOSEPH H. STAMLER,
MELVIN P. ANTELL,
11 Commerce Street,
Newark 2, New Jersey,

LORENTZ & STAMLER,
Of Counsel.

EVERETT I. WILLIS,
40 Wall Street,
New York 5, New York,
Attorneys for Eli Lilly and Company, Appellant.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD,
Of Counsel.

September 1960.